

STATE OF MICHIGAN
COURT OF APPEALS

ESTATE OF KEVIN KARL GOTTSCHALK, by
KATHLEEN TOCCO, Personal Representative,

UNPUBLISHED
September 17, 2020

Plaintiff-Appellant,

v

No. 349274
Macomb Circuit Court
LC No. 2017-002534-NH

PLUMBROOK PHARMACY,

Defendant-Appellee,

and

FREDERIC NEUMANN, D.O., PLUMBROOK
MEDICAL CENTER, and HARTFORD LIFE
INSURANCE COMPANY,

Defendants.

Before: RIORDAN, P.J., and O'BRIEN and SWARTZLE, JJ.

PER CURIAM.

Plaintiff estate appeals as of right the trial court's order granting summary disposition to defendant Plumbrook Pharmacy. As a matter of law, a pharmacy cannot be held liable for medical malpractice, and this is fatal to plaintiff's lawsuit. Having no other viable claim for relief, we affirm summary disposition in favor of Plumbrook.

I. BACKGROUND

This case arises from the death of Kevin Karl Gottschalk after his treating physician simultaneously prescribed him both methadone and Valium, and decedent filled those prescriptions at the pharmacy. Shortly thereafter, decedent was found dead in his home, and an autopsy identified his cause of death as intoxication by the combined effects of the two drugs.

Decedent's estate sued Dr. Neumann, Plumbrook Medical Center, the pharmacy, and Hartford Life Insurance Company. For purposes of this appeal, only the allegations against the

pharmacy are relevant. As to the pharmacy, the estate alleged a single medical-malpractice claim. The pharmacy filed a motion for summary disposition under MCR 2.116(C)(8), arguing that the duties claimed by plaintiff were not recognized under Michigan law. The trial court granted the pharmacy's motion for summary disposition, holding that pharmacies were not licensed healthcare professionals subject to medical-malpractice claims, and thus could only be sued for ordinary negligence. Because the estate's complaint did not raise any claims against individual pharmacists, and did not allege ordinary negligence with regard to the pharmacy, the trial court granted the pharmacy's motion for summary disposition. Additionally, the trial court concluded that any amendment to the complaint would be futile, because the pharmacy had no legal duty to decedent under the circumstances presented.

This appeal followed.

II. ANALYSIS

The trial court granted defendant's motion for summary disposition under MCR 2.116(C)(8) and MCR 2.116(C)(10). We review de novo a trial court's decision regarding a motion for summary disposition. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). Existence of a duty is a question of law for the court. *Baker v Arbor Drugs, Inc*, 215 Mich App 198, 203; 544 NW2d 727 (1996). We review de novo questions of law. *Fultz v Union-Commerce Assoc*, 470 Mich 460, 463; 683 NW2d 587 (2004).

A court may grant summary disposition under MCR 2.116(C)(8) if the opposing party has failed to state a claim on which relief can be granted. *Dalley v Dykema Gossett PLLC*, 287 Mich App 296, 304; 788 NW2d 679 (2010). "A motion under MCR 2.116(C)(8) may be granted only when the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Johnson v Pastoriza*, 491 Mich 417, 435; 818 NW2d 279 (2012) (cleaned up). This type of motion tests the legal sufficiency of the claim based on the pleadings alone. *Bailey v Schaaf*, 494 Mich 595, 603; 835 NW2d 413 (2013); MCR 2.116(G)(5).

Under MCR 2.116(C)(10), summary disposition is appropriate "if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West*, 469 Mich at 183. A genuine issue of material fact exists "when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Id.*

At the outset, the estate concedes that pharmacies "cannot be directly liable for medical malpractice." *Kuznar v Raksha Corp*, 481 Mich 169, 172; 750 NW2d 121 (2008). Instead, claims for medical malpractice may be brought against individual pharmacists. See *Simmons v Apex Drug Stores, Inc*, 201 Mich App 250, 253; 506 NW2d 562 (1993), holding mod on unrelated grounds by *Patterson v Kleiman*, 447 Mich 429; 526 NW2d 879 (1994). Alternatively, a pharmacy can be directly liable for ordinary negligence. *Kuznar*, 481 Mich at 172, 181. Because the estate alleged only a medical-malpractice claim against the pharmacy in this case, it failed to state a claim upon which relief could be granted.

In an argument raised for the first time on appeal, the estate contends that a medical-malpractice claim may be brought against the individual pharmacist who filled decedent's

prescriptions, and that the pharmacy is vicariously liable for the individual pharmacist's actions. Because this vicarious-liability argument is unpreserved, we review it for plain error affecting substantial rights. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000). "Plain error occurs at the trial court level if (1) an error occurred (2) that was clear or obvious and (3) prejudiced the party, meaning it affected the outcome of the lower court proceedings." *Duray Dev, LLC v Perrin*, 288 Mich App 143, 150; 792 NW2d 749 (2010). This Court may exercise its discretion to overlook preservation requirements and reach an unpreserved issue "if the failure to consider the issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented." *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006).

"[A] plaintiff need not necessarily name the agent as a defendant when suing the principal. Alternatively stated, a plaintiff may elect to sue the principal alone, or to sue the principal and the agent together." *Grimmer v Lee*, 310 Mich App 95, 101; 872 NW2d 725 (2015). Yet, while "[n]othing in the nature of vicarious liability . . . requires that a judgment be rendered against the negligent agent," a plaintiff must nevertheless "prove that an agent has acted negligently" to succeed in a claim against the principal. *Al-Shimmari v Detroit Med Ctr*, 477 Mich 280, 294-95; 731 NW2d 29 (2007).

The parties do not dispute that the pharmacist in this case correctly filled the lawful prescriptions written by the treating physician. Further, they do not dispute that there is only a potential danger of serious side effects or death associated with the combination of methadone and Valium. Thus, assuming that the estate could demonstrate an agent-principal relationship in this case, the estate's theory of liability would be premised on the pharmacist having breached a duty to screen for possible drug interactions and intervene in those circumstances where a potential for serious harm exists. The estate urges this Court to overrule binding precedent that pharmacists, or their affiliated pharmacies, are not liable for filling valid, compatible prescriptions. See, e.g., *Baker*, 215 Mich App at 205; *Kintigh v Abbott Pharmacy*, 200 Mich App 92, 94; 503 NW2d 657 (1993); *Adkins v Mong*, 168 Mich App 726, 729; 425 NW2d 151 (1988); *Stebbins v Concord Wrigley Drugs, Inc*, 164 Mich App 204, 218; 416 NW2d 381 (1987). Because this Court is obligated under principles of stare decisis to follow prior published opinions of this Court, the estate's argument is unavailing. See MCR 7.215(C)(2), MCR 7.215(J)(1).

Accordingly, the trial court did not err in granting summary disposition to the pharmacy because plaintiff failed to state a claim upon which relief could be granted. Pharmacies are not liable for medical malpractice, and plaintiff failed to establish that the individual pharmacist in this case violated a duty to decedent such that the pharmacy could be vicariously liable for the individual pharmacist's actions under a claim of medical malpractice.

Affirmed. Defendant, having prevailed in full, may tax costs under MCR 7.219(F).

/s/ Michael J. Riordan
/s/ Colleen A. O'Brien
/s/ Brock A. Swartzle